amination of the claim and the averments in such of the affidavits I have considered as pertinent to my decision must show that the actions in Kuala Lumpur and in Penang are between the same plaintiffs and substantially the same defendants, though of different legal entities and what is more important involve a common question of facts.

It is however submitted that the case of *Dominion Trust Co.* v. *New York Life Insurance Co., Dominion Trust Co.* v. *Mutual Life Assurance Co.* and *Dominion Trust Co.* v. *Sovereign Life Assurance Co.*[3] being a decision of the Privy Council is binding on me and that I should heed the somewhat strong criticism of the decision at first instance to consolidate the actions. Quite obviously, I must and I do accept the proposition that a decision of the Privy Council on a law which though from another country is *in pari materia* with our law is binding not only on me but on every court in the land: see *Khalid Panjang & Ors.* v. *Public Prosecutor (No. 2).*[4] I also accept that the practice in Canada from which the *Dominion Trust Company* cases came is the same as in Malaysia. But, with respect, a reading of the judgment of the Privy Council shows that the criticism of the order for consolidation was directed to the fact that the defences to the claim on the deceased's life insurance policies were on the grounds of misrepresentations or non-disclosures in the applications which were different from one another. Nonetheless their Lordships of the Privy Council instead of setting aside the order and sending the cases back to be tried separately found a common defence which was that the deceased died from his own hand and by a common provision in the policies, suicide of the insured put the insurers out of risks and allowing the appeal, their Lordships found for the insurers. This case therefore does not appear to me to be any authority against consolidation.

Lastly it is said that the law is different, that while in Penang the common law of England applies, in Kuala Lumpur the relevant law is the enacted law in the Specific Relief (Malay States) Ordinance 1950. There are admittedly certain differences in the law, but by and large the Specific Relief (Malay States) Ordinance 1950 is a codification of the English law and if and when the differences in the law apply to this case, I am confident that counsel will assist the trial court in applying the correct law and the court will not meet with any difficulty in doing so. But for myself, I very much doubt if such differences as there are in the law are of any application in this case.

It therefore seems to me that this is a case eminently suitable for consolidation with the Kuala Lumpur action within the scope and intent of Order 49 rule 8, and I so order. I also direct that this action shall henceforth be carried on in the Kuala Lumpur action, and the title amended accordingly in terms of Order 49 rule 8(3).

Costs to be costs in the cause.

I would indicate that if dissatisfaction is felt over this decision of mine, I would not require arguments and would certify to that effect.

Order accordingly.

PALANIAYEE & ANOR. v. TOH WHYE TECK REALTY LTD. & ANOR.

[O.C.J. (Wan Suleiman J.) October 17, 1972]

[Seremban — Civil Suit No. 139 of 1968]

Master and Servant — Vicarious liability for servant's negligence — Res ipsa loquitur.

Negligence — Co-employee — Whether master vicariously liable in negligence — Res ipsa loquitur.

This was an application brought on behalf of the estate of one Sangili, who died of an accident whilst he and the second defendant in the course of their employment were felling a rubber tree in the estate belonging to the first defendant. The plaintiffs alleged that this accident which led to the deceased's death was due to the negligence of the second defendant and therefore his employer the first defendant was vicariously liable.

The plaintiffs sought *inter alia* to rely upon the doctrine of *res ipsa loquitur.*

Held: (1) on the facts it was clear that the fatal injury had resulted from the deceased being struck by the tree which the second defendant with the deceased had felled. The question of defendant's negligence must therefore be determined on the evidence, so that the doctrine of *res ipsa loquitur* became inapplicable;

(2) the evidence showed the system of precautions required to be taken by the defendants was adequate in so far as the deceased was concerned;

(3) as the deceased failed to take the simple precaution required the resulting accident must be attributed solely to his negligence.

Cases referred to:-

(1) *Barkway* v. *S. Wales Transport Co.* [1950] A.C. 185.

(2) *Bolton* v. *Stone* [1951] A.C. 850.

(3) *Fardon* v. *Harcourt Rivington* [1932] All E.R. 81.

(4) *Ng Cheng Ho* v. *Tan Ek Seng & Anor.* [1969] 2 M.L.J. 107.

(5) *Colfar* v. *Coggins & Griffith (Liverpool) Ltd.* [1945] 1 All E.R 326.

CIVIL SUIT.

Gurdial Bakan Singh for the plaintiffs.

Stanley Ponniah for the defendants.

Wan Suleiman J.: This is an action brought on behalf of the estate of Sangili s/o Palaniandy, who died of an accident whilst he and the second defendant in the course of their employment were felling a rubber tree on the estate belonging to the first defendant.

The plaintiffs allege that this accident which led to his death had been due to the negligence of the second defendant and that therefore his employer the first defendant was vicariously liable.

Only the second defendant and deceased were present at the scene of the fatal accident.

The plaintiffs called Sinnan s/o Sadayan to give evidence of the manner in which tree felling operations were conducted on the estate. Like the deceased he had also assisted second defendant, (who was the only one on the estate who did actual felling with a mechanical chain-saw), and like the deceased was employed in this overtime capacity solely to lop off branches of trees felled by second defendant, whilst the latter would himself cut up the trunks into shorter lengths for use in the smoke house. No branches

according to this witness were cut off before a tree was felled, and no ropes used to control direction of fall. Trees were felled in the direction in which they leaned.

Sinnan admitted that before sawing a tree second defendant would tell him to be careful. He would also call out (indicate?) the direction of the fall and ask him not to stand there. Second defendant would also give two warnings, once before he started sawing and again when the tree was about to fall. To enable his helpers to hear the warning, which would otherwise not be audible to anyone standing at about 50 ft. away because of the noise made by the mechanical saw, he would stop sawing before issuing the warning.

Sinnan denied that first defendant, the Estate Manager had ever told him and his fellow workers what safety precautions to take whilst trees were being cut.

Plaintiffs also called a Health Inspector of the Seremban Town Council with considerable experience in supervising the felling of trees. Since this witness admitted that the rather elaborate precautions taken by him were because trees cut were within a built up area, with traffic and pedestrian problems which would not exist on a rubber estate, I do not consider that his evidence is a fair indication of the precautions which should normally be taken in the felling of trees on a rubber estate and therefore propose to ignore it.

DW1 the manager of the estate claimed that he had told deceased that felling trees was a dangerous business and asked him to be very careful. He was also instructed not to stand near the mechanical chain-saw lest it snapped whilst in use, causing him injury. DW1 also told deceased that when a tree was about to fall he should leave the danger zone.

As regards second defendant he had told him that when a tree was about to fall, he should ask every one in the vicinity to move away. He had also supplied second defendant with a length of rope which however was used only when felling trees which were close to buildings. In such cases, branches were cut off before felling, and the rope was used to control direction of the fall. He admitted that he did not place notice boards near trees being felled to notify others that tree felling was in progress.

The second defendant, a mandore on the estate, was the only person there who was both qualified and authorised to fell trees with a motorised chain-saw. Whenever he had to fell a tree he said that he would tell the person assisting him which tree he was felling and ask him to keep away from the danger area. This assistant was also to warn all other people to keep away from such danger area. Deceased had commenced to work with him, that is, to assist in lopping off branches after the tree had been felled some two months before his death. Altogether they had felled between 30 to 40 trees within that period. He had selected the deceased with the approval of Manager for this overtime job. He had heard the latter tell the deceased that his function was to lop off branches after a tree had been felled, to cut the trunks into sections and to stack the wood, and that when a tree was being cut he should stand far away.

On the day in question before he proceeded to fell the tree he had repeated the usual warning to the deceased. They felled one tree without mishap. Before felling the second tree deceased had at his request cleared undergrowth surrounding the tree. He explained that all the undergrowth within the danger area was not removed because that would take too much time. The clearing made in the immediate vicinity of the tree was on DW1's general instructions for the purpose of facilitating the felling and to enable a quick getaway in case of emergency. After deceased had cleared the undergrowth second defendant commenced cutting whilst the deceased stood about 30 ft. away. Both the manager and the second defendant estimated the tree to be about 30 ft. tall and photograph Exhibit D8 appears to confirm that the tree was probably about that height. After he had sawn about half way through the trunk he found it hollow. He then asked deceased to go further away telling him that the tree was hollow and might fall in any direction. He then commenced to saw on the opposite side and on hearing a sqeaking sound indicating that the tree was about to fall he shouted to deceased to run away. A wind was blowing at the time the tree fell. Deceased he added had at first stood at a place where it was not expected that the tree would fall, but unfortunately it fell at an angle of about 90° from the expected direction of fall.

After calling out the first warning he had seen the deceased moving away and from that time it took him about three minutes before he completely sawed through the tree.

Second defendant added that he would himself run away in the opposite direction after ascertaining the direction in which a tree was falling and invariably would shout "the tree is falling" in spite of the noise of the machine.

The plaintiffs sought *inter alia* to rely upon the doctrine of *res ipsa loquitur*. I shall dispose of this matter first.

In the Twelfth Edition of Clerk & Lindsell on Torts in paragraph 796 appears the following passage: —

"The expression *res ipsa loquitur* does not state any principle of law. 'This convenient and succinct formula', said Morris L.J., 'possesses no magic qualities: nor has it any added virtue, other than that of brevity, merely because it is expressed in Latin.' (*Ros* v. *Moh* [1954] 2 Q.B. 66, 87). It is only a convenient label to apply to a set of circumstances in which a plaintiff proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. If the result, in the circumstances in which he proves it, makes it more probable than not that it was caused by the negligence of the defendant, the doctrine *res ipsa loquitur* is said to apply, and the plaintiff will be entitled to succeed unless the defendant by evidence rebuts that probability. The doctrine applies (1) when the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control; (2) the occurrence is such that it would not have happened without negligence. If these two conditions are satisfied it follows, on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is, however, a further negative condition; (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to *res ipsa loquitur* is inappropriate, for the ques-

tion of the defendant's negligence must be determined on that evidence."

I have some doubts whether the plaintiffs can satisfy even the first condition, for whilst the actual felling of the tree was done by second defendant alone, the deceased undoubtedly had control over both his position vis-a-vis the tree, and was himself responsible for warning others to keep away from the area of danger. This latter duty of persons assisting the second defendant is confirmed by Sinnan, one of plaintiffs' witnesses.

In any case there cannot be any doubt that there is evidence as to why or how the occurrence took place, so that condition (3) cannot be satisfied.

When an omnibus left the road and fell down an embankment, the cause of the accident being a burst tyre due to an impact fracture which does not necessarily leave any visible marks on the outer tyre, it was held that the doctrine had no application, and that the omnibus company were negligent in not having a proper system of tyre inspection (*Barkway* v. *S. Wales Transport Co.*[1]). Again in *Bolton* v. *Stone*[2] in which case a cricket ball was driven out of the ground by a batsman and injured a pedestrian on the highway, it was held that because the cause of the injury was know,n the doctrine did not apply.

Here nothing is clearer than the fact that the injury had resulted from the deceased being struck by the tree which the second defendant, with his assistance, had felled. The question of defendant's negligence must therefore be determined on the evidence, so that the doctrine becomes inapplicable.

It was aptly said in *Fardon* v. *Harcourt Rivington*[3] that "what amounts to negligence depends on the facts of each particular case".

As regards the duties of a master to his servant at common law I need only refer to the following passage from the judgment of Wee Chong Jin C.J. in *Ng Cheng Ho* v. *Tan Ek Seng & Anor.*[4]

"The common law duty of a master to his servant, arising out of the relationship of master and servant is stated at paragraph 976 of Halsbury's Laws of England (3rd edition) Volume 25 as follows:—

'A master is under a duty, arising out of the relationship of master and servant, to take reasonable care for the safety of his work-people in all the circumstances of the case so as not to expose them to an unnecessary risk. The master does not warrant the safety of the working conditions, nor is he an insurer of his servants' safety; the exercise of due care and skill suffices. The duty to exercise reasonable care is, however, one which is personal to the master, and if he entrusts its performance to a servant, agent or, it seems, an independent contractor, he is vicariously liable for any negligence on the part of the person so appointed in performing the duty. In order to succeed in an action for damages against his master, a workman must show that his injuries were caused by the master's breach of duty, the onus being upon him to establish both the breach of duty and the fact that the breach was the cause of his injuries.'

One aspect of that duty is to take reasonable care to provide a reasonably safe system of carrying on the relevant operation but the mere happening of an accident does not show that any one (either the master or any one for whom he is vicariously responsible) has been negligent or that there is any defect in the system of working. A servant who sues his master must allege and prove specifically what is the defect in the system of which he complains. It is not sufficient that the system adopted was in fact unsafe, he must show something which could reasonably have been done or omitted which would have made the system reasonably safe and that this failure was the cause of the accident (see Lord Goddard C.J. in the Court of Appeal and Viscount Simon L.C. in the House of Lords in *Colfar* v. *Coggins & Griffith (Liverpool) Ltd.* ([1954] 1 All E.R. 326)."

Have the plaintiffs alleged and proved specifically the defect in the system of carrying on the tree felling operation which caused the fatal injuries to deceased?

It is clear from the particulars of negligence and from the fact that they called a witness to give evidence about the elaborate precautions taken before felling trees in the built up areas of Seremban town for the safety of passers-by that they expected similar precautions to be taken when felling trees in a remote corner of a rubber estate for the safety of a worker not responsible for the felling operation itself. That would explain why Sinnan, their witness gave evidence which in its essentials confirms defendants' account of the safety measures they had themselves taken and considered adequate. I would therefore accept as a fact that defendants had taken the measures described by DW1, the second defendant and Sinnan, and their testimony in other respects.

Had the second defendant been injured, he would perhaps have cause to complain because the conditions under which he worked could without doubt have been made safer by such measures as controlling direction of fall by the use of ropes. However such direction control would not have been necessary in the case of deceased because he was not obliged, and was indeed expected, to be out of the danger area when a tree was being felled. It would be well to bear in mind that his work only began after a tree had been felled.

Far from being defective, the system of precautions taken by the defendants appear to me to be adequate in so far as the deceased was concerned.

It is probable that the wind had affected the direction of fall, but that as well as the fact that the tree had fallen among undergrowth which obscured the deceased from second defendant's view are irrelevant.

Photo Exhibit D8 shows a relatively small rubber tree — which could hardly be much taller than the 30 ft. which both DW1 and second defendant estimated it to be. Deceased was no small child but an adult who had for years lived among rubber trees and who had been present, in the course of assisting second defendant, when the latter felled between 30 to 40 rubber trees. Estimating the height of a tree would be no difficult task to such a person who would it is reasonable to expect, add a further distance as a margin for error, when deciding where to wait for the tree to fall. When he failed to take this simple precaution the resulting accident must be attributed, regardless of the direction in which the tree fell, solely to his own negligence.

Accordingly this action must fail. The suit is dismissed with costs.

Claim dismissed.

Solicitors: *Gurdial Bakan Singh; Stanley Ponniah, Ng & Soo.*